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Air Transport Association

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Aerospace Industries Association

Docket Management System
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These comments are provided in response to the Federal Aviation Administration, 14 CFR Part 13, Flight Operational Quality Assurance Program, Proposed Rules, Docket number FAA-2000-7554, July 5, 2000.

In general, we agree with the statement in the preamble to the proposed rule that "The information and insights provided by FOQA programs significantly enhance line operational safety, training effectiveness, operational procedures, maintenance and engineering procedures, ATC procedures, and airport surface issues." Nevertheless, there are many statements in the preamble that give significant cause for concern.

CAPA

There is one critical paragraph in the proposed rule that must be corrected to ensure industry participation and support regarding FOQA programs. 13.401 (e) (1) must be rewritten and relabeled (e) to read "The Administrator will not use an operator's FOQA data or aggregate FOQA data in enforcement actions against that operator or its employees except for criminal or deliberate acts." In addition, 13.401 (e) (2) states that "The Administrator may use any operator's FOQA data and/or aggregate FOQA data in a remedial enforcement action." This single sentence utterly destroys the spirit, intent and operational effectiveness of any FOQA program, and it impugns the credibility of the rule itself. The sentence is also contradictory to Congressional guidance in the FAA Reauthorization Act that directed the FAA to "...protect air carriers and their employees from enforcement actions ...for violations ...that are reported or discovered as a result of voluntary reporting programs...." Rewriting 13.401 (e) and removing the offending sentence will make the rule workable, acceptable, and supportable from an industry standpoint. In accordance with the required changes to the rule paragraph 13.401 (e), all references to remedial and punitive actions should be removed from the preamble.

IACP

RAA

We would all be better served to return to the original guidance contained in the FAA Reauthorization Act. Any NPRM should go no further than protection from enforcement actions for voluntary reporting programs. Any other issues or concerns could be addressed with Advisory Circulars. Rewriting 13.401(e) and removing the

offending sentence in the rule while making the appropriate tracking adjustments in the preamble will achieve what we all wish to have: a rule that truly enhances safety which we can all fully support.

Please note our detailed comments in the enclosed attachment. They provide the rational and explanation for our position regarding FOQA Programs 14 CFR Part 13, Docket No. FAA-2000-7544 (Notice No. 00-07).

Sincerely,

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President & Chief Executive Officer
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U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

In re:	)	
	)	
Flight Operational Quality Assurance Programs	)	Docket No. FAA-2000-7544 (Notice No. 00-07)
	)	
14 CFR Part 13	)	

Joint Comments of the Aerospace Industries Association, Air Line Pilots Association, Air Transport Association of America, Coalition of Airline Pilots Association, Independent Association of Continental Pilots, and Regional Airline Association

The Aerospace Industries Association (AIA), Air Line Pilots Association (ALPA), Air Transport Association of America (ATA), Coalition of Airline Pilots Association (CAPA), Independent Association of Continental Pilots (IACP), and the Regional Airline Association (RAA), hereinafter the "Joint Commenters," submit these comments in response to the Notice of Proposed Rulemaking published in the Federal Register on July 5, 2000 (65 Fed. Reg. 41528), regarding voluntary implementation by air carriers of Flight Operational Quality Assurance programs (the "NPRM"). The Joint Commenters appreciate the opportunity to provide these comments on behalf of their respective members.[1]

I. INTRODUCTION

When commenting last year on proposed Part 193 concerning voluntarily sharing safety or security-related information with the FAA, several of the Joint Commenters individually noted that those proposed regulations, instead of promoting the voluntary sharing of such information, would have the opposite effect. The problem was that proposed Part 193 included

[1] Appendix 1 lists the members of the joint commenters.

broad and arbitrary exceptions to disclosure protection and explicitly allowed the disclosure and use of information shared voluntarily with the FAA in enforcement actions and criminal prosecutions.[2]

Unfortunately, those comments appear to have fallen on deaf ears, and the Flight Operational Quality Assurance ("FOQA") NPRM, which relies in large part on the asserted protections offered by the yet-to-be-finalized Part 193, suffers from essentially the same defects. Specifically, the NPRM fails to adhere to the express statutory directive to protect air carriers and their employees from enforcement, it exceeds the authority granted to the FAA to encourage voluntary FOQA programs, and it fails to provide adequate assurance that information shared voluntarily will be protected from inappropriate disclosure and/or use. In short, the NPRM will stifle, rather than encourage , industry participation in this vital safety program. Consequently, although the Joint Commenters endorse the FOQA concept and look forward to developing robust FOQA programs for the reasons identified by the FAA,[3] the Joint Commenters cannot support *this* NPRM.

The basic problem with the document is the plan to use FOQA data for enforcement action. The real purpose of FOQA programs is to enhance safety rather than provide the FAA with new tools for enforcement actions. No enforcement action provides incentive to report a problem or to take timely action to correct a problem. The FOQA NPRM is written in tone and terms of an enforcement tool rather than a positive program to enhance safety. Indeed, the very fact that the FAA proposes to put the FOQA program regulations in Part 13, "Investigative and

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[2] *See*, for example, Comments of the Air Transport Association of America, September 24, 1999, Docket No. FAA-1999-6001.

[3] For example, in the NPRM the FAA states "The information and insights provided by FOQA programs significantly enhance line operational safety, training effectiveness, operational procedures, maintenance and engineering procedures, ATC procedures, and airport surface issues." 65 Fed. Reg. at 41528. We agree.

Enforcement Procedures," demonstrates the FAA's intentions to use this program as an enforcement tool and belies the FAA's exhortations to the contrary.

In addition to the potential for enforcement, our second major concern is the proposed requirement to provide FOQA data to the FAA on a regular basis. As explained below, such a requirement will stifle these programs and diminish their usefulness.

II. THE FOQA RULE SHOULD NOT BE USED FOR ENFORCEMENT

A. Section 510 Bars Most Enforcement Actions That Could Be Based on FOQA Data

As the FAA knows, the Joint Commenters individually have long sought formal recognition of FOQA programs. In particular, pilots and airlines through their respective organizations have advocated for an FAA decision to establish rules that would eliminate the threat of enforcement action based on data developed through self-analytical programs, and that would prevent public disclosure of such information if shared with the FAA. Accordingly, the Joint Commenters strongly supported the provision which became section 510 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (the "Ford Act").

Section 510 of the Ford Act directed the Administrator to initiate a rulemaking:

> to protect air carriers and their employees ***from enforcement actions*** for violations of title 14, Code of Federal Regulations, (other than criminal or deliberate acts) that are reported or ***discovered as a result of voluntary reporting programs***, such as the Flight Operations Quality Assurance Program and the Aviation Safety Action Program. (emphasis added).

The plain meaning of this language is that airlines and their employees are not to be subjected to any enforcement actions, other than for criminal or deliberate acts, that come to light as a result of voluntary reporting programs, including FOQA. Thus, § 510 encompasses just two factors: (a) enforcement actions and (b) information from a voluntary program. The only qualification to the scope of the protection that Section 510 affords relates to criminal or deliberate acts. In

particular, § 510 does not say "punitive" enforcement actions or "certain" enforcement actions; it says "enforcement actions." Such an unqualified term allows only one reasonable construction: the FAA is barred from pursuing any and all administrative enforcement actions based on information developed as part of a FOQA program.

Even if the language of section 510 could be characterized as ambiguous, which we do not believe is the case, the legislative history makes it clear that Congress did not intend to distinguish between "punitive" and "remedial" enforcement actions,[4] as the FAA has done in the NPRM. The Joint Explanatory Statement in the Conference Report accompanying H.R. 1000 states the following with regard to Section 510:

> 109. FLIGHT OPERATIONS QUALITY ASSURANCE (FOQA) RULES
>
> *House Bill*
>
> Section 505: Requires FAA to issue a proposed rule within 30 days protecting airlines and airline employees from civil enforcement actions for disclosures made under FOQA. The Final rule is due 1 year after the comment period closes.
>
> *Senate Amendment*
>
> Section 409: Same provision except 90 days is allowed for the issuance of the proposed rule *and it applies to* ***all enforcement actions*** *for violation of the FARs that are reported or discovered as a result of voluntary reporting programs* (such as FOQA and ASAP), other than criminal or deliberate acts. No requirement on final rule.

[4] Additional support that FAA has exceeded its statutory authority is found in the fact that the terms "punitive enforcement" and "remedial enforcement" are not defined anywhere in the Federal Aviation Administration Act or in the FAA's implementing regulations.

Conference Substitute

Section 510: Senate; except that 60 days is allowed for the issuance of the proposed rule.

H.Rept. 106-513, 106th Congress, 2nd Session (March 8, 2000). (Emphasis added).

This sequence of legislative actions makes it clear, beyond any possible doubt, that in adopting Section 510 Congress intended to protect airlines and their employees from all enforcement actions – not just some –for violations of the federal air regulations.

Furthermore, the public interest in safety has long been recognized as the paramount interest in commercial aviation, and Section 510 is consistent with that policy judgment. To a certain extent, this sets aviation apart from other industries. The fact that other Federal agencies may have different enforcement policies, or may have expressed concern about FAA's implementation of § 510 during interagency discussions (65 Fed Reg. at 41532), is irrelevant in light of the express Congressional mandate to implement voluntary programs that protect participants except in the case of criminal or deliberate acts. Where, as here, Congress has stated expressly that enforcement is a secondary consideration in order to promote safety, the concerns expressed by other Federal agencies must give way to that policy judgement.

B. The NPRM Changes Enforcement Policy and is Unacceptable

Not only is the NPRM inconsistent with § 510, it also represents a significant change in program concept and policy from the current policy under which airline demonstration programs have been initiated. *See Policy on the Use for Enforcement Purposes of Information Obtained From an Air Carrier Flight Operational Quality Assurance (FOQA) Program*, 63 Fed Reg. 67505 (December 7, 1998). That policy established the fundamental principle that the FAA would "refrain from using de-identified FOQA information to undertake enforcement actions except in egregious cases." *Id.* at 67506. As the NPRM acknowledges, the demonstration

programs operating under this policy have fulfilled expectations and shown FOQA programs to be extremely effective in enhancing safety.

Without explanation, the FAA has abandoned this policy. Indeed, the requirements in this NPRM are such that the airlines currently operating demonstration FOQA programs probably would never have done so had the NPRM's conditions and rules been in place. Current programs are successful, and there is no legal requirement or policy justification to change them as contemplated by the NPRM. To do so would compromise their credibility with the employees who make these programs work and destroy their effectiveness. Consequently, if the FOQA rule is finalized as proposed, it is unlikely that even the airlines operating demonstration programs will participate.

III. TURNING OVER FOQA DATA TO THE FAA WOULD UNDERMINE THESE PROGRAMS

A. The FAA Does Not Need to Collect Aggregated Data

Under the existing demonstration programs, the FAA does not collect aggregated data. These programs have operated under an agreement that all of the data produced is the property of the participating airline. The FAA has been allowed to view the results of individual FOQA programs on the property of the airline, but the data is not transmitted to the FAA.[5] In large part, this arrangement is in response to concerns expressed by both air carriers and pilot groups about the confidentiality of that data and the potential for its abuse – particularly with regard to enforcement. The NPRM, and the pending rulemaking on Part 193 which is a critical component of this NPRM, have exacerbated those concerns.

[5] Under the direction of the FAA, all participating airlines have developed detailed Implementation and Operation (I&O) plans. These plans lay out step by step processes for the initiation and continued operation of FOQA programs. The I&O plans have been successful in allowing carriers to develop their programs in a systematic way learning from other carriers experiences. Within these plans exist detailed description and process for the carriers to share information from the FOQA program with the FAA without submitting such information to the FAA.

Contrary to the views expressed by the FAA, there is no requirement under Section 510 for the FAA to collect, maintain or analyze airline data (aggregated or specific). Nothing in the Ford Act prevents the FAA from continuing the current procedures under which carriers make aggregate data available for inspection on the carriers' property only. This system has demonstrated safety benefits and avoided confidentiality, disclosure and use problems.

To justify the proposed data collection function, the FAA also proposes that it will further aggregate all of the airline data in order to analyze it. This proposal, however, assumes that such an analytical function enhances the benefits of FOQA. This assumption is incorrect. Submitting aggregated airline data to a central location for further aggregation and analysis does not bring additional value or benefits to FOQA. This is so because individual airline FOQA programs do not operate under uniform definitions and parameters. The data collected by the various airlines participating in these programs varies considerably. For example, definitions, including event trigger points, are customized by each airline to best provide safety information to that airline's operations. As such, aggregating data for comparison as proposed in the rule will be difficult, at best. Such an exercise will not provide meaningful results.

Alternatively, forcing uniform standards will reduce the utility of these programs to individual airlines since the data collection would no longer be tailored to their individual operations.[6] Furthermore, even if uniform standards could be established, the data use and disclosure issues discussed above would remain. Since there is no evidence to suggest that the proposed data sharing would be valuable, and much to suggest that it could be harmful, it would be counterproductive to require it.

[6] One of the major benefits of the FOQA programs is the flexibility that is built into these programs as they develop and mature. This flexibility enables the carriers' to analyze the data freely to apply information to its operation. This flexibility though limits the ability for cross-carrier sharing of aggregated FOQA data.

In sum, requiring airlines to provide data to the FAA on a regular basis will actually stifle these programs and diminish their usefulness. In addition, there are very real concerns about the security of the data once it leaves the control of the airline. Since much of this data provides proprietary information regarding airline operations, and since the information is extremely susceptible to intentional or unintentional misrepresentation if released to a third party, a requirement to share that information is not acceptable.

B. Individual Airline "Raw" Data Should Never Be Used

Finally, the NPRM states that it would expect to use "raw" data underlying an individual airline's aggregated data in two circumstances: (1) when the aggregated data suggests rulemaking should be undertaken, and (2) when the aggregated data indicates a need for remedial action. 65 Fed. Reg. 41531. We are unalterably opposed to these proposals.

In the first instance, FAA does not currently have the authority to require airlines to turn over data to support rulemaking. It can *request* data informally or through formal notice and comment rulemaking. Nothing in Section 510 alters this fundamental limitation on FAA's authority. Second, as discussed in detail above, Section 510 does not authorize FAA to use voluntarily provided information for enforcement purposes except in cases of criminal or intentional wrongdoing. The "remedial-punitive" enforcement distinction FAA attempts to create is not supported by the Ford Act and is a transparent attempt to satisfy the concerns expressed by other agencies.

IV. CONCLUSION

The FAA has failed to follow both the text and the spirit of § 510 of the Ford Act, which directed the FAA to "protect air carriers and their employees from enforcement actions for violations of Title 14, Code of Federal Regulations, (other than criminal or deliberate acts) that are reported or discovered as a result of voluntary reporting programs, such as the Flight

Operations Quality Program and the Aviation Safety Action Program." The final rule must protect airlines and employees from enforcement actions as a result of participating in voluntary reporting programs. Any other issues or concerns should be addressed with Advisory Circulars or through the Aviation Rulemaking Advisory Committee.

It is important to recognize that FOQA programs are being implemented on a voluntary basis by airlines and pilots because they have a strong interest in improving flight safety for the traveling public. The airlines have invested millions of dollars in these programs. The fact that these programs are, and should remain, voluntary requires a different approach to regulation. It is vital that the FAA recognize that without appropriate protection, the incentive for the airlines' further investment in these programs diminishes significantly. Therefore, the final rule must encourage – rather than discourage – the implementation of these valuable safety programs. This requires that airlines and their employees be protected from the threat of enforcement action based on the otherwise unavailable data, and that the information be fully protected from intentional as well as unintentional disclosure to outside parties. Neither the NPRM, nor proposed Part 193, achieve this goal.

Respectfully submitted,

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AEROSPACE INDUSTRIES ASSOCIATION

By: _____

AIR LINE PILOTS ASSOCIATION

By: _____

COALITION OF AIRLINE PILOTS ASSOCIATION

By: _____

INDEPENDENT ASSOCIATION OF CONTINENTAL PILOTS

By: _____

REGIONAL AIRLINE ASSOCIATION

By: _____

September 28, 2000

APPENDIX 1

The Air Transport Association (ATA) is the nations oldest and largest airline trade association. Its membership consists of 23 U.S. and five associate (non-U.S.) carriers. U.S. Members account for greater than 95 percent of the passenger and cargo traffic carried by scheduled U.S. airlines.

The Airline Pilots Association (ALPA) represents 58,000 pilots from 50 U.S. and Canadian Airlines.

The Aerospace industries Association (AIA) represents 63 of the nation's manufacturers of commercial, military, and business aircraft, helicopters, aircraft engines, missiles, spacecraft, and related components and equipment.

The Coalition of Airline Pilots Association (CAPA) is a trade association operating on a consensus basis to address issues of concern to professional airline pilots. Its 25,855 members include the Allied Pilots Association (American Airlines), FedEx Pilots Association, Independent Pilots Association , Southwest Airlines Pilots Association, Teamsters Local 1224 (Airborne Express Pilots), IBT Airline Division, and National Pilots Association (Air-Trans Pilots).

The Independent Association of Continental Pilots (IACP) represents 7,000 pilots of Continental Airlines and Continental Express Airlines.

The Regional Airline Association (RAA) represents 62 member airlines that transport 97 percent of total regional airline industry passengers.